No. 83-392

In the Supreme Court of the United States

OCTOBER TERM, 1983

PRIMITIVO FLORES RUIZ,

Petitioner,

v.

HOYT C. CUPP, Superintendent,
Oregon State Penitentiary,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

DAVE FROHNMAYER
Attorney General of Oregon
WILLIAM F. GARY
Deputy Attorney General
JAMES E. MOUNTAIN, JR.
Solicitor General
*THOMAS H. DENNEY
Assistant Attorney General
100 Justice Building
Salem, Oregon 97310
Telephone: (503) 378-4402
Counsel for Respondent

*Counsel of Record

QUESTIONS PRESENTED

1. On the day before petitioner's state-court trial was to begin, the trial judge denied, as untimely, the request of petitioner and his retained counsel to allow counsel to withdraw, because of unspecified differences between petitioner and himself, and to postpone petitioner's trial until petitioner obtained other counsel. Did the trial judge thereby violate petitioner's Sixth-Amendment right to have the assistance of counsel for his defense?

2. In petitioner's state-court trial for custodial interference, the prosecution showed that, over the objection of the parents of a 14-year-old girl, petitioner, a 44-year-old man, had encouraged the girl to keep in touch with him, arranged for her transportation to Canada, and there entered into a purported marital agreement with her. Does petitioner's conviction violate due process of law, on the theory that this evidence is insufficient to support a finding, beyond reasonable doubt, that petitioner took or enticed the girl in question from the custody of her parents, with intent to hold her permanently or for a protracted period?

3. During petitioner's state-court trial for custodial interference, the trial judge informed the jury that another judge had "advised" petitioner not to communicate with the child petitioner was accused

of subsequently enticing away from her parents. Was this evidence of petitioner's culpable mental state such an improper showing of irrelevant and prejudicial "other misconduct" that its admission denied petitioner due process of law?

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OPINIONS BELOW

The opinion of the United States District Court for the District of Oregon denying Ruiz's petition for a writ of habeas corpus (Petition, at App-4) is not reported. The memorandum of the United States Court of Appeals for the Ninth Circuit affirming the judgment of the district court (Petition, at App-1) was not designated for publication, and is also not reported.

JURISDICTION

Respondent accepts petitioner's statement of the grounds on which the jurisdiction of this Court is invoked.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent accepts petitioner's statement of the constitutional provisions and statutes which this case involves.

STATEMENT OF THE CASE

Respondent believes petitioner's statement of the case one-sided and incomplete. Respondent accepts that statement only with the following additions and clarifications.

1. In 1980, Ruiz was convicted in an Oregon state trial court of custodial interference in the first degree, in violation of Oregon Revised Statutes 163.257. The charge was predicated on the theory

that Ruiz, a 44-year-old man, had enticed a 14-year-old girl to run away from her parents' home and join him in Canada, where they cohabited for three weeks, before Ruiz was arrested and returned to Oregon. The Oregon Court of Appeals summarily affirmed Ruiz's conviction without written opinion, 50 Or. App. 615, 625 P.2d 1390 (1981); and the Oregon Supreme Court denied his petition for discretionary review of the Court of Appeals' decision, 291 Or. 117, 631 P.2d 341 (1981).

Ruiz then petitioned for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254. The district court denied his petition, and the court of appeals affirmed the judgment of the district court. Ruiz's petition for certiorari followed.

2. On the day before Ruiz's state-court trial was to begin, his retained counsel asked for leave to withdraw from the case, and presented a combination of motions which were apparently intended to postpone Ruiz's trial, regardless of whether or not counsel's request for permission to withdraw was granted. Ruiz's summary of what transpired on this occasion (Petition, at 6-8) is incomplete. Before counsel asked to withdraw from Ruiz's case, he moved as follows:

> "[DEFENSE COUNSEL]: Yes. May it please the court, Your Honor, as the court is aware, I talked with you on Friday regarding this appearance in court today of Mr. Ruiz. There has been a

matter come up, my representation of Mr. Ruiz, that has affected the attorney-client relationship.

"Before I do that, however, I would like to orally move at this time — the trial in this matter is set for tomorrow, Tuesday, and I would orally move at this time for a continuance until a later time on the basis that Mr. Ruiz has several matters which he feels are, through another person by the name of Thoren, has filed a matter in Federal Court which he feels should be disposed of prior to the State court action, and that has not been taken care of, and so on those bases he wishes to have a continuance in the matter so that he can more fully prepare the case, and so on that basis I would move the court to continue the case from Tuesday, the 22nd of January, until a later date.

"THE COURT: Is there anything further that you wanted to relate to the court concerning this matter?

"[DEFENSE COUNSEL]: Also, Your Honor, I'd at this time want to withdraw as his attorney, [*etc.*]" (Trial Tr. 26-27. *Cf.* Petition, at 6).

3. During Ruiz's trial, the prosecution proposed to offer into evidence a copy of the judgment in an earlier case, in which Ruiz had been convicted of sexual abuse of the girl involved in the case on trial and had been ordered, as a condition of probation, to have no further contact with the girl (Trial Tr. 69-71). When defense counsel objected to this proffered evidence as irrelevant and unduly prejudicial, the trial court held it admissible for its bearing on the mental element of the crime charged, but undertook to "sanitize" the evidence in question, by simply telling the jury that:

> "* * * [Y]ou are advised that on July 5, 1979, Circuit Judge Jack F. Olsen advised the defendant that he was not to contact or communicate with Lori M. Kolding by mail, by phone, in person, or by any manner whatsoever, nor should he cause others to contact her or communicate with her." (Trial Tr. 73; Petition, at 17).

4. While the jury found Ruiz guilty of two charges of custodial interference, predicated on alternative theories of guilt (*i.e.*, "taking" the girl and "enticing" her (*see* Trial Tr. 87, 98-99)), the trial court ordered the two charges merged for sentencing purposes (Trial Tr. 116). Hence, contrary to Ruiz's assertion at page 8 of his petition, he was "convicted" of only one charge.

REASON FOR DENYING THE WRIT

The federal questions presented are not substantial enough to warrant review by this Court.

The merits of the contentions Ruiz raises in his petition for certiorari have already been considered by one state appellate court, on Ruiz's direct appeal from his conviction, and by two lower federal courts, in the present habeas corpus proceedings. None of these courts has found any substance to those contentions. Indeed, we think that to state Ruiz's two due-process claims in terms of the facts of this case, as our rephrasing of his second and third "Questions Presented" attempts to do, is sufficient to

demonstrate their lack of merit. Like the court of appeals (*see* Petition, at App-2), we see no need to elaborate upon the reasons given by the district court for rejecting those claims. *See* Petition, at App-9 to App-12.

The right-to-counsel claim advanced in Ruiz's first "Question Presented" appears to be nothing less than an assertion that the Sixth Amendment requires the trial court to postpone a criminal trial whenever the defendant expresses dissatisfaction with his present counsel or counsel indicates that he and his client are in disagreement over some unspecified matter. Ruiz thus seems to be arguing that he is constitutionally entitled to the very kind of "meaningful relationship" between attorney and client which this Court has held *not* to be constitutionally required in *Morris v. Slappy*, ___ U.S. ___ 75 L.Ed.2d 610 (1983). And his reliance upon *Holloway v. Arkansas*, 435 U.S. 475 (1978), in support of such an argument, is misplaced. Unlike *Holloway*, the present case does not involve the potentially conflicting interests of multiple defendants who were represented by the same attorney. As the district court succinctly put it, "this case presents no conflict of interest, only a conflict of personalities" (*see* Petition, at App-8).

The courts below properly held that, on the record of this case, the Oregon trial court was not

required by the Sixth Amendment to grant the request of Ruiz and his retained counsel, made on the day before trial was scheduled to begin, for postponement for an indeterminate time, so that, *inter alia*, counsel could withdraw, Ruiz could retain new counsel, and new counsel could familiarize himself with the case. That holding does not warrant reexamination by this Court.

CONCLUSION

For the above reasons, the petition for certiorari should be denied.

Respectfully submitted,

DAVE FROHNMAYER
Attorney General of Oregon
WILLIAM F. GARY
Deputy Attorney General
JAMES E. MOUNTAIN, JR.
Solicitor General
THOMAS H. DENNEY
Assistant Attorney General
Counsel for Respondent